

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**DEFENDANTS' JOINT PROPOSED SUPPLEMENTAL
FINDINGS OF FACT, CONCLUSIONS OF LAW**

Defendants respectfully submit the proposed supplemental findings of fact and conclusions of law attached as Appendix A.

BY: /s/ Jay T. Jorgensen
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Bryan Burns
Timothy T. Jones
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, Ark. 72764

Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/ John H. Tucker
John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

**ATTORNEYS FOR CARGILL, INC. AND
CARGILL TURKEY PRODUCTION, LLC**

BY: /s/James M. Graves
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
Gary V. Weeks
Woodson W. Bassett III
James M. Graves
Vince Chadick
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
MCDANIEL, HIXON, LONGWELL
& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

**ATTORNEYS FOR PETERSON
FARMS, INC.**

BY: /s/ John R. Elrod
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
John R. Elrod
Vicki Bronson, OBA #20574
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN, REID,
BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

CERTIFICATE OF SERVICE

I certify that on the 1st of March, 2010, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us fc_docket@oag.state.ok.us suzy_thrash@oag.state.ok.us
Kelly Hunter Foster, Assistant Attorney General	kelly.foster@oag.state.ok.us jean.burnett@oag.ok.gov
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	jsummerlin@riggsabney.com rgarren@riggsabney.com
Sharon K. Weaver	delis@riggsabney.com sweaver@riggsabney.com
David P. Page	sdewald@riggsabney.com dpage@riggsabney.com
<i>Riggs Abney Neal Turpen Orbison & Lewis</i>	skinnett@riggsabney.com
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
<i>Riggs Abney</i>	jzielinski@riggsabney.com
Louis W. Bullock	lbullock@bullock-blakemore.com
Robert Murray Blakemore	bblakemore@bullock-blakemore.com bdejong@bullock-blakemore.com nholdge@bullock-blakemore.com
<i>Bullock, Bullock & Blakemore, PLLC</i>	
Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
<i>Motley Rice LLC</i>	
Frederick C. Baker	fbaker@motleyrice.com
	fhmorgan@motleyrice.com
	mcarr@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
	mjaromin@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Mathew P. Jasinski	mjasinski@motleyrice.com

Motley Rice

COUNSEL FOR STATE OF OKLAHOMA

Stephen L. Jantzen

sjantzen@ryanwhaley.com
dmaple@ryanwhaley.com
jlee@ryanwhaley.com
mkeplinger@ryanwhaley.com
pryan@ryanwhaley.com
amcpherson@ryanwhaley.com
jmickle@ryanwhaley.com
pbuchwald@ryanwhaley.com

Patrick M. Ryan

Paula M. Buchwald

Ryan, Whaley & Coldiron, P.C.

Thomas C. Green

Mark D. Hopson

Jay Thomas Jorgensen

tcgreen@sidley.com
mhopson@sidley.com
jjorgensen@sidley.com
lsenior@sidley.com

Timothy K. Webster

twebster@sidley.com
jwedeking@sidley.com
fvolpe@sidley.com
gtodd@sidley.com
eives@sidley.com
cviglucilopez@sidley.com

Frank R. Volpe

Gordon D. Todd

Erik J. Ives

Cara R. Viglucci Lopez

Sidley Austin LLP

Michael R. Bond

michael.bond@kutakrock.com
sue.arens@kutakrock.com
erin.thompson@kutakrock.com
dustin.darst@kutakrock.com

Erin Walker Thompson

Dustin R. Darst

Kutak Rock LLP

Robert W. George

L. Bryan Burns

Timothy T. Jones

robert.george@tyson.com
bryan.burns@tyson.com
tim.jones@tyson.com
amanda.burcham@tyson.com
carol.ross@tyson.com

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay

rtl@kiralaw.com
dianna@kiralaw.com

Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin

jgriffin@lathropgage.com

Frank M. Evans
Lathrop & Gage, L.C.

COUNSEL FOR WILLOW BROOK FOODS, INC.

cshoemaker@lathropgage.com
fevans@lathropgage.com

Robert P. Redemann
William David Perrine
Gregory Allen Mueggenborg

Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
wperrine@pmrlaw.net
gmueggenborg@pmrlaw.net
cwatson@pmrlaw.net
kcharters@pmrlaw.net

David C. Senger

Coffey, Gudgel and McDaniel, PLLC

david@cgmlawok.com
crystal@cgmlawok.com

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

George W. Owens
Randall E. Rose

The Owens Law Firm, P.C.

gwo@owenslawfirmnpc.com
rer@owenslawfirmnpc.com
ka@owenslawfirmnpc.com

Woody Bassett
Gary V. Weeks
Vincent O. Chadick
James M. Graves
KC Dupps Tucker
Earl Buddy Chadick

Bassett Law Firm

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

wbassett@bassettlawfirm.com
gweeks@bassettlawfirm.com
vchadick@bassettlawfirm.com
jgraves@bassettlawfirm.com
kctucker@bassettlawfirm.com
bchadick@bassettlawfirm.com
nmcgill@bassettlawfirm.com

Archer Scott McDaniel
Nicole Marie Longwell
Craig A. Mirkes

McDaniel Hixon Longwell & Acord PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
cmirkes@mhla-law.com
lvictor@mhla-law.com
jwaller@mhla-law.com

Sherry P. Bartley

sbartley@mwlaw.com

jdavis@mwlaw.com

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

COUNSEL FOR PETERSON FARMS, INC.

John R. Elrod

jelrod@cwlaw.com

vmorgan@cwlaw.com

Vicki Bronson

vbronson@cwlaw.com

lphillips@cwlaw.com

P. Joshua Wisley

jwisley@cwlaw.com

Conner & Winters, P.C.

Bruce W. Freeman

bfreeman@cwlaw.com

astall@cwlaw.com

D. Richard Funk

rfunk@cwlaw.com

Conner & Winters, LLP

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker

jtuckercourts@rhodesokla.com

gbarber@rhodesokla.com

Colin H. Tucker

chtucker@rhodesokla.com

scottom@rhodesokla.com

Theresa Noble Hill

thillcourts@rhodesokla.com

Kerry R. Lewis

klewiscourts@rhodesokla.com

mnave@rhodesokla.com

Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West

terry@thewesetlawfirm.com

The West Law Firm

Delmar R. Ehrich

dehrich@faegre.com

dherber@faegre.com

qsperrazza@faegre.com

Bruce Jones

bjones@faegre.com

dybarra@faegre.com

eolson@faegre.com

Krisann Kleibacker Lee

kklee@faegre.com

mlokken@faegre.com

Todd P. Walker

twalker@faegre.com

bcouzart@faegre.com

Christopher Harold Dolan

lcarahan@faegre.com

cdolan@faegre.com

cbrennan@faegre.com

Colin C. Deihl

cdeihl@faegre.com

jsullivan@faegre.com

Faegre & Benson LLP

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves
D. Kenyon Williams, Jr.

mgraves@hallestill.com
kwilliams@hallestill.com
jspring@hallestill.com

COUNSEL FOR POULTRY GROWERS

William B. Federman
Jennifer F. Sherrill

wbf@federmanlaw.com
jfs@federmanlaw.com
ngb@federmanlaw.com
law@federmanlaw.com

Federman & Sherwood

Charles Moulton

charles.moulton@arkansag.gov
Kendra.Jones@arkansas.gov
jim.depriest@arkansasag.gov

Jim DePriest

Office of the Attorney General

**COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL
RESOURCES COMMISSION**

Gary S. Chilton
Holladay & Chilton PLLC

gchilton@hollidaychilton.com

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, LLP

vschwartz@shb.com
csilverman@shb.com

Robin S. Conrad
National Chamber Litigation Center, Inc.

rconrad@uschamber.com

**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND
THE AMERICAN TORT REFORM ASSOCIATION**

Richard C. Ford

fordr@crowedunlevy.com
kenneyj@crowedunlevy.com
burnettl@crowedunlevy.com
zaloudic@crowedunlevy.com
ecf@crowedunlevy.com

LeAnne Burnett

Crowe & Dunlevy

COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins

richard.mullins@mcafeetaft.com

Reuben Davis

allison.mack@mcafeetaft.com

reuben.davis@mcafeetaft.com

lisa.vann@mcafeetaft.com

McAfee & Taft

James D. Bradbury

jim@bradburycounsel.com

James D. Bradbury, PLLC

**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS
ASSOCIATION OF DAIRYMEN**

A. Diane Hammons, Attorney General

dhammons@cherokee.org

Sara E. Hill, Assistant Attorney General

sara-hill@cherokee.org

christina-carroll@cherokee.org

ccarroll@cherokee.org

danitacox@cherokee.org

sglory@cherokee.org

COUNSEL FOR CHEROKEE NATION

A. Michelle Campney

campneym@wwhwlaw.com

steelmana@wwhwlaw.com

Adam Joseph Siegel

ajsiegel@hhlaw.com

Angela Diane Cotner

AngelaCotnerEsq@yahoo.com

Barry Greg Reynolds

reynolds@titushillis.com

brogers@titushillis.com

David Edward Choate

dchoate@fec.net, brendab@fec.net

Derek Stewart Allan Lawrence

hm@holdenoklahoma.com

Douglas L. Boyd

dboyd31244@aol.com

Duane L. Berlin

dberlin@levberlin.com

blyon@levberlin.com

J. Ron Wright

ron@wsfw-ok.com

James Taylor Banks

jtbanks@hhlaw.com

Jessica Eileen Rainey

jrainey@titushillis.com

kalverson@titushillis.com

Jo Nan Allen

jonanallen@yahoo.com

bacaviola@yahoo.com

John Brian DesBarres

mrjbdb@msn.com

John David Russell

jrussell@fellerssnider.com

sortega@fellerssnider.com

tudstuen@fellerssnider.com

John Stephen Neas

steve_neas@yahoo.com

Kenneth Edward Wagner

kwagner@lswsl.com

Linda C. Martin

Lloyd E. Cole , Jr.

Mackenzie Lea Hamilton Jessie
Marcus N. Ratcliff

Mia Vahlberg

Michael Lee Carr

Michael Todd Hembree

Nikaa Baugh Jordan
Philard Leason Rounds , Jr.

Robert Park Medearis , Jr.
Ronnie Jack Freeman
Thomas Janer
Thomas James McGeady
Tim Keith Baker
Tony Michael Graham
William A. Waddell , Jr.
William Francis Smith
William S. Cox , III

sshanks@lswsl.com
lmartin@dsda.com
mschooling@dsda.com
colelaw@windstream.net
gloriaeubanks@windstream.net
melissa_colelaw@windstream.net
maci.tbakerlaw@sbcglobal.net
mratcliff@lswsl.com
sshanks@lswsl.com
mvahlberg@gablelaw.com
chayes@gablelaw.com
courtfilling@gablelaw.com
hm@holdenoklahoma.com
MikeCarr@HoldenOklahoma.com
hembreelaw1@aol.com
gwendy37@yahoo.com
njordan@lightfootlaw.com
hm@holdenoklahoma.com
PhilardRounds@holdenoklahoma.com
medearislawfirm@sbcglobal.net
jfreeman@grahamfreeman.com
SCMJ@sbcglobal.net
tjmcgeady@loganlowry.com
tbakerlaw@sbcglobal.net
tgraham@grahamfreeman.com
waddell@fec.net
bsmith@grahamfreeman.com
wcox@lightfootlaw.com

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following persons who are not available via electronic email notification:

John E. and Virginia W. Adair Family Trust
RT 2 BOX 1160
STILWELL, OK 74960

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Cary Silverman

Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

Cherrie House
P O BOX 1097
STILWELL, OK 74960

Donna S. Parker
34996 S 502 RD
PARK HILL, OK 74451

Doris Mares
14943 SE 15TH ST
CHOCTAW, OK 73020-7007

Dustin McDaniel
Office of the Attorney General (Little Rock)
323 Center St
Ste 200
Little Rock, AR 72201-2610

G. Craig Heffington
20144 W SIXSHOOTER RD
COOKSON, OK 74427

George R. Stubblefield
HC-66, BOX 19-12
PROCTOR, OK 74457

Gordon W. Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Jerry M. Maddux
Selby Connor Maddux Janer
P O BOX Z
BARTLESVILLE, OK 74005-5025

Jim Bagby

RR 2, Box 1711
Westville, OK 74965

Jonathan D. Orent
Motley Rice LLC (Providence)
321 S MAIN ST
PROVIDENCE, RI 02940

Justin Allen
Office of the Attorney General (Little Rock)
323 Center St
Ste 200
Little Rock, AR 72201-2610

Marjorie Garman
19031 US HWY 412
COLCORD, OK 74338-3861

Randall E. Kahnke
Faegre & Benson (Minneapolis)
90 S 7TH ST STE 2200
MINNEAPOLIS, MN 55402-3901

Richard E. Parker
34996 S 502 RD
PARK HILL, OK 74451

Robin L. Wofford
Rt 2, Box 370
Watts, OK 74964

Steven B. Randall
58185 COUNTY RD 658
KANSAS, OK 74347

Susann Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Victor E. Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

William House

P O BOX 1097
STILWELL, OK 74960

/s/ Jay T. Jorgensen

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Appendix A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 4:05-cv-00329-GKF-PJC

**DEFENDANTS' JOINT PROPOSED SUPPLEMENTAL
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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BACKGROUND

1. During closing arguments on February 18, 2010, the Court requested submission of supplemental findings of fact and conclusions of law with respect to a theoretical remedy not addressed by the parties' prior submissions. *See* Tr. at 11883:9-11884:1 (closing arguments); *see also id.* at 11687:18-11688:15, 11792:25-11795:3, 11812:4-11814:22 (closing arguments).

2. The potential remedy would entail the Court's issuance of an injunction as follows:

(i) Operators of poultry feeding operations ("Growers") may apply poultry litter to their own land in accordance with the application rates and instructions set forth in Animal Waste Management Plans or Nutrient Management Plans (collectively referenced herein as "AWMPs");

(ii) To the extent a Grower's poultry feeding operation in the Illinois River Watershed ("IRW") generates poultry litter in excess of that which may be applied to the Grower's own land under their AWMP, the poultry litter the Grower does not personally use must be exported outside the IRW; *and*

(iii) That Defendants must effectuate this export of poultry litter outside of the IRW by *either* purchasing the litter and transporting it outside the IRW *or* developing a market for the sale and transport of the litter outside of the IRW. *See* Tr. at 11687:18-11688:15, 11792:25-11795:3, 11812:4-11814:22, 11883:9-11884:1 (closing arguments).

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

3. Based on the findings of fact and conclusions of law set forth below, the Court rejects imposition of the proposed injunctive remedy.

I. The Court Cannot Order The Proposed Remedy Absent A Finding Of Liability That Is Not Supported By The Evidence

4. As an initial matter, it is black letter law that the Court cannot impose this proposed remedy—or any remedy—without first concluding that the State has met its burden of proving all of the elements of a violation of law. *See, e.g., Crandall v. City & County of Denver*, ___ F.3d ___, 2010 U.S. App. LEXIS 2596, at *12 (10th Cir. Feb. 8, 2010) (“The dispositive issue in this case is whether Plaintiffs have established the merits of their claim, the first requirement for a permanent injunction.”); *Punchard v. BLM*, 180 Fed. App’x 817, 820 (10th Cir. 2006) (“We deny his motion for a permanent injunction ... because he has not shown *actual success on the merits.*”) (emphasis added); *Aponte v. Calderon*, 284 F.3d 184, 191, 197 (1st Cir. 2002) (holding that plaintiff’s inability to succeed on the merits of the claim is “dispositive” in finding that “the district court abused its discretion when it issued the permanent injunction”).

5. In this case, the State of Oklahoma has not satisfied its burden to prove all of the elements of one or more of its underlying claims—including but not limited to the elements of intent, causation, agency and injury. Further, to order the proposed remedy the Court must also conclude that the defenses offered in evidence at trial fail, meaning that the Court must find that the individuals who applied poultry litter under the specific terms of an AWMP nevertheless lacked legal authorization to perform the activity in question. Although the Court believes that the furtherance of a market for litter would be a positive development, it will not enter the injunction at issue. The Court further recognizes that to the extent liability were found, the proposed remedy would not be the end of the matter. To the contrary, any imposition of liability

and remedy potentially would invite further litigation from the State and other parties seeking to use such a liability finding to obtain additional forms of monetary and injunctive relief in successive litigation.

6. In accordance with the reasons set forth in *Defendants' Joint Proposed Findings of Fact, Conclusions of Law*, Dkt. No. 2874 (Feb. 5, 2010),¹ this Court finds that the State has failed to carry its burden of proof on the elements of its remaining claims. On the basis of this ruling, the Court rejects imposition of any proposed remedy.

II. The Proposed Remedy Would Supplant The Comprehensive Poultry Litter Regulations Adopted By Oklahoma And Arkansas

7. For the additional reasons set forth below, the Court finds that the proposed remedy should not be imposed because it is both redundant of, and in conflict with, the comprehensive regulatory litter management programs operated by Oklahoma and Arkansas. The proposed remedy does not avoid supplanting Oklahoma and Arkansas law with regard to the application of poultry litter, as the law of both States contains extensive provisions allowing third parties to obtain an AWMP and apply poultry litter that they acquire in the marketplace to their lands. The rights of those third parties were not extensively discussed at trial in this matter (presumably because the affected parties were not before the Court), but that does not render their interests or rights less important.

8. The laws of Oklahoma and Arkansas require that every person who applies poultry litter within the IRW must first obtain a valid applicator's certificate issued by the State Board of Agriculture. *See* 2 Okla. Stat. § 10-9.17(A); Okla. Admin Code §§ 35:17-7-3(a), 4(a);

¹ Defendants subsequently submitted an *Errata to Dkt. No. 2874, Defendants' Joint Proposed Findings of Fact and Conclusions of Law*, Dkt. No. 2876 (Feb. 6, 2010), to include the Table of Contents and Table of Authorities that were inadvertently omitted from the original filing.

Ark. Code Ann. § 15-20-1106(d)(1)(A). Moreover, the implementing regulations from both states require that the land application of poultry litter must comply with a written AWWMP. *See* 2 Okla. Stat. § 10-9.19a (“Land application of poultry waste, whether performed by a private or commercial poultry waste applicator, shall comply at all times with the provisions set forth in: (1) [t]he Animal Waste Management Plan, if application is conducted on land operated by a registered poultry operation; and (2) [t]he Conservation Plan, if application is conducted on land operated by [non-Growers] and is located in a nutrient-limited watershed”); Ark. Code Ann. § 15-20-1106(a) (“It shall be a violation ... to apply designated nutrients [including poultry litter or commercial fertilizer] ... within a nutrient surplus area unless the nutrient application is done in compliance with a nutrient management plan approved by [ANRC] or at a protective rate established by the commission.”); *see also Court’s Findings of Fact and Conclusions of Law on Defs.’ Motions for Partial Judgment Pursuant to Rule 52(c)*, Dkt. No. 2884 at 4-6 ¶¶4-7 (Feb. 19, 2010) (“Rule 52(c) Findings”).

9. The regulatory regimes in place in both Oklahoma and Arkansas recognize that Growers are not the only persons who land-apply poultry litter in the IRW. As this Court has previously ruled, “[i]t is well established on this record that poultry litter has value in the marketplace as a fertilizer and soil amendment, and that poultry growers, ranchers and others in the IRW routinely use poultry litter by applying it to pastures and other crops as a fertilizer and soil amendment.” *Rule 52(c) Findings*, Dkt. No. 2884 at 14 ¶4 (internal citations omitted). “Poultry growers testified they sell poultry litter to their neighbors,” and affirmed that “[o]ne factor currently limiting litter sales outside of the IRW is that neighbors of poultry growers want to purchase the litter from nearby sources, and poultry growers accede to this local demand.” *Id.* at 13 ¶3 (internal citations omitted). Accordingly, the record evidence demonstrates that—

beyond what Growers may use on their own land—third-party farmers and ranchers inside and outside the IRW regularly obtain poultry litter on the open market to apply on their own land. *See also* Tr. at 3734:4-12 (Pigeon) (Grower sells litter to neighbors to land apply as fertilizer); 4471:15-23 (Reed) (same); 4192:4-12 (Simmons) (Growers sell litter to neighbors for use as fertilizer); 3959:4-8 (D. Henderson) (same); 4801:5-12 (Houtchens) (same); 5128:2-5 (Johnson) (“it’s a common practice that cattlemen and hay farmers purchase and land apply litter”).

10. Oklahoma’s and Arkansas’ comprehensive poultry litter regulations—which expressly authorize the land application of poultry litter in the IRW by certified applicators on behalf of third-party farmers and ranchers—represent the best scientific and policy judgments of the legislatures and executive agencies of Arkansas and Oklahoma. The political branches of both States have established the conditions and limits under which Growers and third-party farmers and ranchers may utilize poultry litter as a fertilizer, and have hired soil scientists to embody those standards into field-specific AWMPs. The law of two States should not lightly be set aside by this Court in favor of a judge-made rule. *See Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 41 (1909) (“The case must be a clear one before the courts ought to be asked to interfere [by injunction] with state legislation upon the subject of [gas] rates....”); *see also Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001) (“In determining the scope of injunctive relief that interferes with the affairs of a state agency, we must ensure, out of federalism concerns, that the injunction ‘heels close to the identified violation,’ and is not overly ‘intrusive and unworkable ... [and] would not require for its enforcement the continuous supervision by the federal court over the conduct of [state officers].’”) (quoting *Gilmore v. California*, 220 F.3d 987, 1005 (9th Cir. 2000); *O’Shea v. Littleton*, 414 U.S. 488, 500, 501 (1974)); *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006) (“Deference to the agency is especially strong where the

challenged decisions involve technical or scientific matters within the agency’s area of expertise.”) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

11. Moreover, the existing regulations already ensure that Growers do not apply “excess” litter on their lands. For example, in Oklahoma, one of the elements of the annual inspection process is to check how much litter may be applied on-site and to confirm that any additional or excess litter generated has been removed from the property. *See, e.g.*, Tr. at 3865:8-3872:15 (identification, and subsequent correction, of reporting error noted during annual inspection) (Pigeon); Ok. Ex. 2875D (same). Although the litter removed is not necessarily taken out of the IRW, the existing regulatory regime already ensures that excess litter (*i.e.*, litter generated on a Grower’s operations in excess of what can be applied on the Grower’s property under an AWMP) is not applied onsite. To that extent, the injunction would be redundant.

12. Based on the foregoing, this Court finds that the proposed injunctive remedy would by necessity interfere with and supplant the regulatory schemes of Oklahoma and Arkansas by enjoining the sale of litter to (and application of litter by) third-party farmers and ranchers operating in the IRW.

III. No Evidentiary Basis Or Demonstrated Need Exists For The Proposed Remedy

13. Putting aside the hurdles to finding liability or supplanting the existing regulatory regime, discussed *supra*, the Court concludes that on the trial record there is no basis or demonstrated need to require Defendants to buy or transport litter or to otherwise act as “market makers” for poultry litter export from the IRW. As the Court has previously found, there is a market for poultry litter that currently exists in and outside of the IRW. The evidence showed that this market is developing on its own. Moreover, improving or encouraging the growth of the market through judicial injunction would likely prove impracticable and judicially unmanageable, and may have unintended negative effects on the market’s natural development.

A. The Market for Poultry Litter Is Functioning and Currently Results in Substantial Exports of Poultry Litter from the IRW

14. As the Court has found previously, both Oklahoma and Arkansas have implemented comprehensive poultry litter regulatory schemes. *See Rule 52(c) Findings*, Dkt. No. 2884 at 4-6 ¶¶4-7; *supra* at ¶¶8-11. One intended effect of these regulatory schemes is to encourage the movement of poultry litter out of nutrient-rich watersheds where litter generated cannot be land applied under the existing, protective standards. Indeed, the State's own expert, Dr. Robert Taylor, agreed that regulatory schemes such as the phosphorous index implemented by Arkansas (and, indeed, most States), will enhance the profitability of litter hauling operations. *See Tr. at 6943:4-17 (Taylor)*.

15. The trial record demonstrates that, as Oklahoma and Arkansas have restricted the manner, locations and amounts in which poultry litter may be applied in the IRW, a market has developed to move poultry litter to locations where it may be applied legally.

16. As the Court found previously in rejecting the State's RCRA claim, poultry litter is a beneficial fertilizer and soil conditioner, and a valuable "agricultural commodity for which there is both a market and a market value in the IRW." *Rule 52(c) Findings*, Dkt. No. 2884 at 12-13 ¶¶1-2. Specifically, the evidence at trial was uncontested that poultry farmers, ranchers and others buy, sell and trade poultry litter, and have done so for many years. *See Tr. at 3734:4-12 (Pigeon); 3901:10-16 (Collins); 4507:18-4508:3 (Reed); 4552:19-4553:18, 4589:15-4590:18 (Saunders) (poultry litter currently sells for \$15 per ton in the barn); 6831:17-6832:5 (Taylor) (poultry litter has cash value)*. As poultry litter transporter Roger Collins testified, the value of poultry litter has increased to a level where farmers are cautious not to apply more than necessary for immediate crop growth in order to preserve the opportunity to sell the litter. *See Tr. at 3940:12-17 (Collins)*.

17. The record demonstrates substantial local commercial demand for poultry litter. *See Rule 52(c) Findings*, Dkt. No. 2884 at 13-14 ¶¶3-4. The poultry farmers who testified at trial, each of whom was called by the State, testified that poultry litter proceeds offset other farm costs and support other farm activities. *See, e.g.*, Tr. at 4497:1-4498:3 (Reed); 4555:15-4556:2, 4590:19-4591:10 (Saunders). Several explained that they run multiple businesses on their farms and, for example, use poultry litter to enhance grass yields to support additional cattle operations. *See, e.g.*, Tr. at 3958:4-3959:3 (D. Henderson); 4421:19-4422:2 (Storm) (“Typically one of the benefits of a contractual relationship [with a poultry integrator] is that the contract grower wants the manure for their own land for fertilizing purposes.”); 4574:8-19 (Saunders) (poultry litter from grower operation increased cattle production four-fold). Some farmers contract to raise poultry specifically in order to secure access to poultry litter. *See, e.g.*, Tr. at 4490:4-4491:6 (Reed) (“If I didn’t have the litter, I wouldn’t be able to afford to fertilize my land and I would probably have to cut my cattle herd two-thirds.”); *see also* Tr. at 4497:1-4498:3 (Reed); 4570:2-4571:18 (Saunders) (testifying that he became a poultry grower in part because his soil was poor and needed fertilizer, he could not afford commercial fertilizer, and that poultry litter has allowed him to grow grass and expand his cattle operations).

18. In addition to using poultry litter themselves, many Growers sell or trade poultry litter locally. *See Rule 52(c) Findings*, Dkt. No. 2884 at 13-14 ¶¶3-5. For example, Jim Pigeon, a Tyson Grower, explained that in the past when he has not land-applied litter himself, he has sold it to his neighbors. *See* Tr. at 3734:4-12 (Pigeon); *see also* Tr. at 4471:15-23 (Reed) (Grower sells litter to neighbors to land apply as fertilizer); 4192:4-12 (Simmons) (Growers sell litter to neighbors for use as fertilizer); 3959:4-8 (D. Henderson) (same); 4801:5-12 (Houtchens) (same); 5128:2-5 (Johnson) (“it’s a common practice that cattleman and hay farmers purchase

and land apply litter”). As this Court has previously recognized, “[o]ne factor currently limiting litter sales outside of the IRW is that neighbors of poultry growers want to purchase the litter from nearby sources, and poultry growers accede to this local demand.” *Rule 52(c) Findings*, Dkt. No. 2884 at 13 ¶3.

19. Nevertheless, the record also contains evidence of the development of a broader litter market. As this Court has found, “[t]he market for poultry litter is not limited to the IRW. Rather, poultry litter is bought, sold and traded in a marketplace that is not necessarily defined by the boundaries of any particular watershed.... The evidence shows that some poultry litter is and has been exported outside the IRW for use as a fertilizer.” *Rule 52(c) Findings*, Dkt. No. 2884 at 14-15 ¶6 (citing Tr. at 1369:18-1371:20, 1376:23-1380:11 (Phillips); 3058:9-24 (M. Henderson); 3721:15-3722:11 (Pigeon); 3931:15-3933:3 (Collins); 4306:18-4307:12 (McClure); 4498:4-4499:25 (Reed); 4553:1-18 (Saunders); 4637:11-25 (Patrick); Ok. Ex. 2535; Ok. Ex. 5881).

20. The State of Oklahoma has devoted resources to promoting the market that moves poultry litter out of nutrient limited watersheds. *See* Tr. at 1369:18-1371:20, 1376:23-1380:11 (Phillips). Defendants similarly have contributed to such efforts through a non-profit entity called BMPs, Inc. *See* Tr. at 4815:10-4816:8 (Houtchens). Several witnesses also testified to selling or moving poultry litter out of the IRW. For example, Tyson Grower W.A. Saunders testified that he sells poultry litter to farmers who transport and apply the litter as far away as Kansas, Missouri. *See* Tr. at 4552:19-4553:18 (Saunders). And Tyson Grower Jim Pigeon testified that since 2004 *all* of the litter generated at Green Country Farms, the largest poultry growing operation in the entire IRW, has been hauled out of the IRW. *See* Tr. at 3721:15-3722:11 (Pigeon). Cargill has also hauled litter out of its six breeder farms in the Arkansas portion of the IRW in recent years. *See* Tr. at 4970:23-25, 4972:3-6 (Alsup). Additionally,

Georges' Farms hauls all of its litter out of the watershed, as do some of its Growers. *See* Tr. at 3058:1-24 (M. Henderson). By 2006, BMPs, Inc. and George's alone exported over 69,000 tons of poultry litter per year from the IRW, which is 19.5% of the State's estimate of total yearly litter production within the watershed. *See* Ok. Ex. 2535. This number does not include the exports from Cargill and its Growers, or other Growers who make private arrangements for sale to third parties outside the IRW. In sum, while the record does not demonstrate the exact amount of poultry litter that is currently being exported from the IRW, the number appears to be well in excess of 20% of the total.

21. Of particular interest to the Court was the testimony of Roger Collins, a former poultry grower who has invested in developing a poultry litter hauling business. Mr. Collins explained that he trades poultry barn clean-out services for poultry litter. *See* Tr. at 3891:22-3892:15 (Collins). He then operates five trucks full-time transporting that poultry litter elsewhere, including out of the IRW, where he then land-applies it for end-customers. *See* Tr. at 3931:7-23 (Collins). Mr. Collins' tractor trailers have hauled litter within a 200-mile radius surrounding the IRW. *See* Tr. at 3932:13-3933:3 (Collins).

22. Certainly, this market is not fully developed. As Mr. Collins acknowledged, his is not yet a mature business. *See* Tr. at 3932:2-4 (Collins). However, the record shows that the current market is developing and expanding in response to the availability of poultry litter and the need to move it to areas where it may be safely and legally applied. While there is ample evidence that Growers and applicators frequently sell and ship litter, there is absolutely no evidence on this record that any Grower has been unable to use, sell, or trade his litter if he so desired. *See Rule 52(c) Findings*, Dkt. No. 2884 at 15 ¶9 ("The State has not produced sufficient evidence to convince the court that farmers, ranchers or other applicators in the IRW land

applies, or has land-applied, poultry litter within the IRW solely to discard it.”). In sum, there is no record evidence that the market for poultry litter needs or would benefit from stimulation, assistance or development beyond that already afforded by natural market forces, the existing efforts of the States, Defendants and BMPs, Inc., and the initiative of the Growers themselves.

23. Moreover, the Court is reluctant to insert itself into a market that the evidence showed is functioning and developing. Judicially designed remedies are not always beneficial to the development of markets. Courts (and the special masters they employ) do not respond to market forces in the same way as market participants, and judicial efforts to encourage trade, develop markets and set prices can have unintended and harmful effects. “[T]he Supreme Court has recently and repeatedly reminded us that ‘[c]ourts are ill suited ‘to act as central planners, identifying the proper price, quantity, and other terms of dealing.’” *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1226 (10th Cir. 2009) (quoting *Pac. Bell Tel. Co. v. linkLine Communs., Inc.*, ___ U.S. ___, 129 S. Ct. 1109, 1121 (2009); *Verizon Communs., Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004)); *see, e.g., MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133-1134 (9th Cir. 2004) (“[Plaintiff] is essentially asking this court to ‘identify[] the proper price’ that [defendant] should charge in the retail market -- a role the Supreme Court has deemed courts ill suited to perform.”) (quoting *Trinko*, 540 U.S. at 408); *Greco v. Verizon Communs., Inc.*, 2005 U.S. Dist. LEXIS 4434, *9-10, *14-15 (S.D.N.Y. Mar. 17, 2005) (same); *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 139 (D.D.C. 2006) (“the judicial forum is not tooled to be the most efficient and efficacious one for determining reasonable prices in a volatile market”).

24. In addition, federal courts should be reluctant to grant equitable relief—such as the proposed remedy described herein—that “will ordinarily require continuing supervision of a

highly detailed decree.” *Trinko*, 540 U.S. at 414-15. The remedy that the State would have the Court impose would take the place of the regulations that ODAFF has already studied, adopted and implemented, and which ODAFF itself can adjust to respond to changing circumstances. “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.” *Id.* at 415 (internal quotations omitted). Even if a problem had been proven and causation by the defendant had been established, the “problem should be deemed irremedia[ble]” when the remedy “requires the court to assume the day-to-day controls characteristic of a regulatory agency.” *Id.* (internal quotations omitted); *see also Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (“[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.”) (internal footnote omitted); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161-66 (1948) (vacating injunction that “implicate[d] the judiciary heavily in the details of business management”); Restatement (Second) of Torts § 943 cmt. a (“In determining the appropriateness of injunctive relief, the court must give consideration to the practicality of drafting and enforcing the order or judgment. If drafting and enforcing are found to be impracticable, the injunction should not be granted.”).

25. As Judge Kozinski observed, “[c]ourts are slow, clumsy, heavy-handed institutions, ill-suited to oversee the negotiations between corporations, to determine what compromises a manufacturer and a retailer should make in closing a mutually profitable deal, or to evaluate whether an export-import consortium is developing new markets in accordance with the standards of the business community.” *Oki America, Inc. v. Microtech Int’l, Inc.*, 872 F.2d 312, 316 (9th Cir. 1989) (J. Kozinski, concurring) (internal citation omitted). These cautions have full force here, where the evidence showed that the market for poultry litter is developing in

response to regulations and other incentives and is already moving substantial amounts of poultry litter outside the IRW.

26. Even if the Court were inclined to assume the role of central planner in the litter market, the record is devoid of the evidentiary basis necessary for this Court to design and implement the proposed remedy. As Cargill's counsel observed during closing arguments, were the Court to order the proposed injunctive remedy, the price demanded of Defendants (as a single subset of coerced buyers) could rise dramatically requiring the Court to artificially replicate the market processes inherent in setting a "fair" price. *See* Tr. at 11814:1-12 (closing arguments). In this case, the trial record lacks any evidence on which the Court may base its present or future calculations of the market value (*i.e.* price to be paid) to each Grower for the exported litter.² And because the Growers themselves are not before the Court, as discussed below, the Court lacks the power to compel them to sell their litter to the Defendants—whether at a Court-determined price or at any price at all.

27. Additionally, beyond regulation of the terms of dealing, the proposed remedy would require continuing judicial intervention to administer the participation of Defendants (not all of which are presently or may in the future be operating in the IRW), as well as to account for new entrants to the market not subject to the Court's order.

28. Finally, an injunction is not an appropriate form of relief if it is unlikely to prevent the damage or remediate the injury at issue. *See Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 43-44 (E.D. La. 1966) ("A court, of course, normally refrains from issuing an

² Dr. Robert Taylor's estimates with respect to the cost of trucking all or some of the litter out of the IRW do not address this issue. Furthermore, Professor Taylor's estimates were based upon an academic study published in 2007 and made a number of unrealistic assumptions, including using unsubstantiated cost numbers and basing distribution for all of the poultry litter in the IRW from a non-existent centralized transfer station. *See* Tr. at 6945:25-6949:2 (Taylor).

injunction unless the injunction ‘will be effective to prevent the damage which it seeks to prevent.’”) (quoting *Great N. Ry Co. v. Lumber & Sawmill Workers Local Union No. 2409*, 140 F. Supp. 393, 396 (D. Mont. 1955), *aff’d* 232 F.2d 628, 629 (9th Cir. 1956), *cert. denied* 352 U.S. 837 (1956)).

29. The record does not support the conclusion that the proposed remedy would result in any improvement of the water quality in the IRW. No expert for the State has testified that water quality standards would improve if the application of poultry litter were limited in accordance with the proposed remedy. To the contrary, evidence from the State’s own witnesses indicates that in order to shift Lake Tenkiller’s status from a primarily eutrophic system to a mesotrophic system there would have to be a 70 percent to 80 percent reduction in the total current phosphorus loading (including loading from all point and nonpoint sources), which would require “dramatic shifts in land use in the watershed,” including “perhaps removal of a significant portion of the agricultural community, and a shift back to the natural forested conditions of the watershed.” Tr. at 1235:9-15, 1236:9-16 (Phillips). Defendants’ experts agreed with the State’s witnesses that reducing the amount of poultry litter, as described in the proposed remedy, would have no effect on the water quality of the IRW. *See* Tr. at 8998:22-8999:16, 9000:25-9001:10 (Connolly) (testifying that the water quality issues in the IRW are dominated by point source contributions).

30. For the reasons set forth above, the Court declines to order the proposed injunctive remedy based on its finding that an insufficient factual and legal basis exists for the Court to insert itself in the operation of the existing poultry litter market’s exportation of litter out of the IRW.

B. Poultry Litter Generated in the IRW May Be Lawfully Applied to Land within the IRW

31. This Court finds that the record lacks evidence that there is not sufficient acreage of pasture in the IRW on which litter might be lawfully applied to allow for compliance with Oklahoma's and Arkansas' comprehensive regulatory regimes.

32. It is true that many farmers and ranchers in the IRW currently do not land apply litter. There may be limits on how much litter may lawfully be applied in the IRW because some landowners may refuse to use litter. But, there is no evidence that such a saturation point has been reached. In fact, the record is devoid of evidence of any significant violations of the poultry regulations under either Oklahoma or Arkansas law.

33. These findings are consistent with the State's evidence regarding the average and median STP values on litter applied fields. The sample of fields that are tested for STP levels are those fields to which litter has been applied in the past and to which litter is expected to be applied in the future. But even using these non-representative samples, the evidence presented by the State indicated that in the four Oklahoma counties in the IRW, the mean STP level is 107,³ and the median level is 55 STP. *See* Tr. at 10161:7-10162:5 (Rausser) (discussing TyDefDemo 352); 10484:20-10485:1 (Dicks).⁴

³ Drs. Rausser and Dicks testified to calculations performed on 2007 data, and Dr. Johnson testified regarding data from 2004-2007. *See* Tr. at 10161:16-24 (Rausser). For 2004-2007, Dr. Johnson calculated the mean STP level in the four counties to be 102. *See* Tr. at 5057:24-5058:2 (Johnson).

⁴ Although Dr. Dicks testified Dr. Johnson's "average STP was 55," the data and other testimony show the average for 2007 was 107. Dr. Dicks apparently was referring to the median, which the data show to be 55.

34. The limited record evidence identifying actual STP levels for land throughout the IRW supports the conclusion that there are many fields in the IRW with STP levels below 65, 120 and 300. Non-Grower fields alone bear this out.^{5 6 7}

⁵ Examples of non-Grower fields with STP levels 0-65: OKEX2930B_OKDA0019998, OKEX2930B_OKDA0020000, OKEX2930B_OKDA0019996, OKEX2879B_OKDA0015237, OKEX2804B_OKDA0006383, OKEX2864B_OKDA0014511, OKEX2880B_OKDA0015346, OKEX2880B_OKDA0015344, OKEX2864B_OKDA0014510, OKEX2864B_OKDA0014509, OKEX2864B_OKDA0014508, OKEX2768B_OKDA0002785, OKEX2825B_OKDA0008805, OKEX2768B_OKDA0002786, OKEX2768B_OKDA0002787, OKEX2880B_OKDA0015349, OKEX2880B_OKDA0015347, OKEX2880B_OKDA0015345, OKEX2880B_OKDA0015350, OKEX2768B_OKDA0002788, OKEX2768B_OKDA0002789, OKEX2880B_OKDA0015343, OKEX2825B_OKDA0008783, OKEX2825B_OKDA0008796, OKEX2768B_OKDA0002791, OKEX2768B_OKDA0002795, OKEX2825B_OKDA0008795, OKEX2825B_OKDA0008784, OKEX2768B_OKDA0002792, OKEX2768B_OKDA0002793, OKEX2825B_OKDA0008778, OKEX2768B_OKDA0002796, OKEX2768B_OKDA0002802, OKEX2768B_OKDA0002801, OKEX2825B_OKDA0008790, OKEX2881B_ODAFF(DEC07)005022, OKEX2881B_ODAFF(DEC07) 005024, OKEX2881B_ODAFF(DEC07)005025, OKEX2865B_ODAFF(DEC07)004234, OKEX2857B_ODAFF(DEC07) 003952, OKEX2798B_OKDA0005587, OKEX2910B_OKDA0018223, OKEX2879B_OKDA0015238, OKEX2857B_ODAFF(DEC07)003955, OKEX2910B_OKDA0018222, OKEX2881B_ODAFF(DEC07) 005027, OKEX2881B_ODAFF(DEC07) 005029, OKEX2881B_ODAFF(DEC07) 005028, OKEX2885B_ODAFF(DEC07) 005166, OKEX2880B_OKDA0015342, OKEX2881B_ODAFF(DEC07) 005010, OKEX2881B_ODAFF(DEC07) 005011, OKEX2865B_ODAFF(DEC07) 004226, OKEX2857B_ODAFF(DEC07) 003942, OKEX2865B_ODAFF(DEC07) 004228, OKEX2881B_ODAFF(DEC07) 005013, OKEX2881B_ODAFF(DEC07) 005012, OKEX6942E_ODAFF(DEC07) 004916, OKEX6942E_ODAFF(DEC07) 004926, OKEX6942E_ODAFF(DEC07) 004917, OKEX2881B_ODAFF(DEC07) 005015, OKEX2686B_ODAFF_SUPP_05-08_002178, OKEX2881B_ODAFF(DEC07) 005016, OKEX2881B_ODAFF(DEC07) 005017, OKEX2857B_ODAFF(DEC07) 003946, OKEX2688B_ODAFF_SUPP_05-08_001916, OKEX2686B_ODAFF_SUPP_05-08_002184, OKEX2686B_ODAFF_SUPP_05-08_002179, OKEX2672B_ODAFF_SUPP_05-08_001835, OKEX2672B_ODAFF_SUPP_05-08_001843, OKEX2672B_ODAFF_SUPP_05-08_001844, OKEX2666B_ODAFF_SUPP_05-08_001716, OKEX2672B_ODAFF_SUPP_05-08_001836, OKEX2665B_ODAFF_SUPP_05-08_001425, OKEX2666B_ODAFF_SUPP_05-08_001715.

⁶ Examples of non-Grower fields with STP levels of 66-120: OKEX2914B_OKDA0018729, OKEX2914B_OKDA0018731, OKEX2914B_OKDA0018728, OKEX2804B_OKDA0006386, OKEX2880B_OKDA0015348, OKEX2804B_OKDA0006381, OKEX2804B_OKDA0006382, OKEX2825B_OKDA0008804, OKEX2825B_OKDA 0008787, OKEX2768B_OKDA0002794, OKEX6942C_ODAFF(DEC07) 004016, OKEX2825B_OKDA0008800, OKEX6942F_ODAFF(DEC07) 005479, OKEX2930B_OKDA0019960, OKEX6942E_ODAFF(DEC07) 004925,

IV. The Proposed Injunctive Relief Would Improperly Impact Rights Of Absent Parties

35. Federal law and principles of due process make clear that a Court cannot enjoin parties that are not before the Court. *See* Fed. R. Civ. P. 65(d)(2) (order granting an injunction “binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation”); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973) (Rule 65 codifies the “common-law doctrine that a decree of injunction” applies only to parties and “those identified with them in interest, in privity with them, represented by them or subject to their control”) (internal quotations omitted); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (“[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.”); *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 346 (S.D.N.Y. 2002) (finding injunctive relief inappropriate in part because “while an order from this Court to ‘clean up plaintiffs’ property’ would serve to bind the defendants, it would have no operative effect on” non-parties involved in the alleged pollution); *see also Aerated Prods. Co. v. Dept. of Health*,

OKEX6942F_ODAFF(DEC07) 005474, OKEX2881B_ODAFF (DEC07) 005009, OKEX6942F_ODAFF (DEC07) 005476, OKEX2865B_ODAFF (DEC07) 004229, OKEX2865B_ODAFF (DEC07) 004227, OKEX2881B_ODAFF (DEC07) 005014, OKEX2885B_ODAFF (DEC07) 005165, OKEX2685B_ODAFF_SUPP_05-08_001931

⁷ Examples of non-Grower fields with STP levels of 121-299: OKEX2914B_OKDA0018727, OKEX2914B_OKDA0018730, OKEX2914B_OKDA0018732, OKEX2798B_OKDA0005588, OKEX2825B_OKDA0008786, OKEX2825B_OKDA0008797, OKEX2825B_OKDA0008788, OKEX2825B_OKDA0008794, OKEX2864B_OKDA0014513, OKEX2881B_ODAFF (DEC07) 005023, OKEX2885B_ODAFF (DEC07) 005167, OKEX6942F_ODAFF (DEC07) 005475, OKEX2881B_ODAFF (DEC07) 005018, OKEX2857B_ODAFF (DEC07) 003945, OKEX2690B_ODAFF_SUPP_05-08_001797, OKEX2672B_ODAFF_SUPP_05-08_001837, OKEX2672B_ODAFF_SUPP_05-08_001845, OKEX2565B_ODAFF_SUPP_05-08_002340.

159 F.2d 851, 854 (3d Cir. 1947). This rule is based on the principle that the Court should adjudicate only the rights of the parties before the Court, and should seek to avoid imposing remedies that materially impact the rights of non-parties. The *MTBE* decision is instructive. In *MTBE*, as here, non-parties to the litigation owned the instrumentality that was allegedly the source of the pollution. The court found injunctive relief inappropriate and observed that “[w]here a third party-owned [instrumentality] is the source ... the third party’s cooperation -- in allowing defendants to enter its property, in ... taking whatever steps are necessary to curtail future [pollution] -- is essential to any remediation program.” *MTBE Prods. Liab. Litig.*, 209 F.R.D. at 346.

36. Here, the proposed remedy would dramatically impact the rights of two groups of non-parties: (1) Growers and (2) non-Grower ranchers, farmers and commercial litter applicators. The evidence shows that the Growers are third parties because they are independent contractors operating their own farms, and not the Defendants’ employees. Defendants and poultry Growers both consider poultry Growers to be independent contractors. *See, e.g.*, Ok. Ex. 6564a; Ok. Ex. 6564b; Ok. Ex. 6564c; Tr. at 3412:1-8, 3423:22-3424:9, 3425:5-21, 3426:5-14 (Pilkington); 4301:21-4302:1 (Murphy); 4733:1-3 (Maupin); 3025:14-18, 3046:10-11 (M. Henderson); 4514:9-12 (Reed); 3926:15-3927:4 (Collins); 4084:19-20 (Anderson).

37. Although most contracts do not expressly address the ownership of poultry litter, they do provide specifically that the poultry companies retain ownership of feed, medicine, and other similar supplies.⁸ Both Growers and the Defendants universally understand that poultry Growers own the litter generated on their farms. *See* Tr. at 4088:24-4089:23 (Anderson);

⁸ Peterson contracts explicitly state that Growers own the poultry litter and that they shall retain all economic benefits from the use or disposition of the litter. *See* DJX 1814 at 3; Tr. at 6774:7-12 (Taylor).

4496:2-9 (Reed); 4545:17-22 (Saunders); 3026:18-3027:1 (M. Henderson); 4687:12-19, 4763:4-11 (Maupin); 4797:1-9, 4802:10-17 (Houtchens); Court Ex. 6 (Wear Dep.) at 55:7-14.

38. Consistent with this understanding, Growers retain the proceeds derived from any sale or barter of their poultry litter. *See* Tr. at 3856:11-23 (Pigeon); 4491:17-19, 4497:1-12, 4500:4-10 (Reed); 4300:17-19 (Murphy); 4958:21-23 (Alsup); 3419:24-3420:2 (Pilkington). Growers rely on the litter that results from their poultry raising operations to support other farm activities such as cattle ranching, or as a source of cash income or for barter. *See* Tr. at 1446:14-1447:11 (Phillips); 4555:15-4556:2, 4570:2-21, 4574:8-19, 4590:19-4591:10, 4606:11-4607:25 (Saunders); 3856:11-23 (Pigeon); 4473:22-24, 4490:4-4491:6, 4497:1-4498:3 (Reed); 4089:13-4090:4 (Anderson); *see also* Tr. at 3958:4-3959:8 (D. Henderson) (it is common for farmers to own both poultry and cows and to use the litter to raise forage); 4421:19-4422:2 (Storm) (“Typically one of the benefits of a contractual relationship [with a poultry integrator] is that the contract grower wants the manure for their own land for fertilizing purposes.”) .

39. To implement the proposed remedy, the Court would need to insert itself into the operations of both Growers and non-Grower farmers, ranchers and commercial litter applicators. When a Grower has litter to sell or barter, the injunction will not allow the Grower to select a buyer in the marketplace, but will rather require that the Grower sell his or her litter to a buyer outside the IRW or the Defendants. This will force the Court into yet another oversight position outside its traditional sphere—*i.e.*, the management of contractual relationships between the Defendants and non-parties. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008) (“Courts are institutionally ill-suited to enforce and superintend private contracts among business entities where the concerned entities themselves are not parties to the suit.”). Moreover, because Growers are not parties to this action, an order enjoining Defendants to

purchase poultry litter from Growers whose AWMPs show they will have some left-over litter can only bind Defendants. *See* Fed. R. Civ. P. 65(d)(2); *see, e.g., MTBE Prods. Liab. Litig.*, 209 F.R.D. at 346. An injunction here cannot reach the Growers, who will remain free to store the litter, sell it to a preferred buyer, or barter it for services.

40. Finally, the proposed injunction will have one of two results with regard to non-Grower farmers and ranchers. Either the injunction will be effective in preventing them from buying litter and applying it according to the terms of their AWMPs, in which case the Court will have dramatically impacted the rights of absent non-parties and set aside the laws of both Oklahoma and Arkansas. Or, the injunction will be ineffective because it cannot bind the conduct of third-party farmers and ranchers who accordingly may be able to buy litter outside the IRW and import it. The proposed injunction would do nothing to preclude the importation of poultry litter by anyone other than Defendants, possibly resulting in no more than a Sisyphean mandate: as one litter truck leaves the watershed, another enters.

41. Whichever result flows from this proposal to enter an injunction that is primarily targeted at third parties, the result will be contrary to the law and the facts proven at trial. This particular remedy, like the others the State has proposed, reaffirms that any injunctive relief awarded by this Court will be impracticable and unenforceable. It confirms what the evidence indicates—*i.e.*, that the existing Arkansas and Oklahoma regulatory systems, even if imperfect, are the most appropriate and practical remedies for the State's claims. These regulatory systems provide the adequate deterrents and incentives to the flow of litter into and out of the IRW—as arrived at and determined by the States' representatives—and at once reach all individuals who

land-apply poultry litter in the IRW.⁹ Thus, the regulations avoid all of the difficulties of adjudicating the rights of non-parties and the problems with Court-imposed remedies. The proposed injunction is not an appropriate remedy in light of the record before this Court and the economic and regulatory realities that exist beyond this courtroom.

⁹ Indeed, the Arkansas regulations also reach those who apply commercial fertilizers. *See* Ark. Code Ann. § 15-20-1103(8)(B); Ark. Code Ann. 15-20-1106(a).

CONCLUSION

For the foregoing reasons, the Court rejects imposition of the proposed injunctive remedy.

IT IS SO ORDERED THIS ____ DAY OF _____, 2010.

Hon. Gregory K. Frizzell
United States District Judge
Northern District of Oklahoma

ADDENDUM A – Exhibit Index

Exhibit 1 Trial Transcripts

Exhibit 2 Court Ex. 6 (Wear Dep.)